1964

# The State Insurance Fund v. Industrial Commission of Utah et al : Brief of Defendant

Utah Supreme Court



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# IN THE SUPREME COURT OF THE STATE OF UTAH



THE STATE INSURANCE FUND,
*Plaintiff*,

— vs. —

THE INDUSTRIAL COMMISSION OF UTAH, ALFRED LUND and UNITED PARK CITY MINES CO.,
*Defendants.*

Case No. 10095

## BRIEF OF DEFENDANT UNITED PARK CITY MINES CO.

Appeal From Order of the Industrial Commission of Utah

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## INDEX



### Cases Cited



### Statutes Cited

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### NATURE OF THE CASE

This is a claim under the Utah Occupational Disease Law (herein called the "O. D. Law") for permanent disability benefits by reason for silicotuberculosis. Defendant United Park City Mines Company (herein called "defendant employer") and plaintiff are in dispute as to which of them has obligation to pay whatever benefits defendant Alfred Lund (herein called "defendant Lund") is entitled to receive. Defendant employer joins plaintiff, however, in plaintiff's assertion that defendant

Lund's exposure does not satisfy the requirements of the O. D. Law and that, on any findings of facts the evidence will support, benefits may not properly be awarded in this case.

## STATEMENT OF FACTS

Defendant employer adopts and concurs in plaintiff's statement of facts, with the following addition:

1. During the period from December 1, 1961, through December 30, 1961, defendant Lund was employed under conditions which entailed as much exposure to silicon dioxide dust as did the conditions of his employment with defendant employer during any previous period after he began working above ground in 1931. In his employment during December of 1961, defendant Lund was engaged in cleaning dried mine muck (having the silicon content characteristic of the mine) off tools, and his use of a respirator in that work was necessary (R. 38). In his previous jobs after 1931, he worked above ground (R. 33), and there is no evidence that his exposure was anything but the common experience of all residents of the Park City community.

## ARGUMENT

### POINT I.

### IF THE DISABILITY IN THE INSTANT CASE IS COMPENSABLE, PLAINTIFF, AS THE COMPENSATION INSURANCE CAR-

RIER AT THE TIMES WHICH ARE DETERMINATIVE, IS RESPONSIBLE FOR PAYMENT.

Plaintiff primarily argues the evidence does not support the Commission's finding that defendant Lund was exposed to harmful quantities of silicon dioxide dust for five of the fifteen years preceding his disablement. As we have indicated, we fully concur in plaintiff's argument in this regard.

If the exposure has been sufficient, however, plaintiff still asserts its freedom from responsibility, and it does so on two theories. It will be defendant employer's purpose in this brief to explore those two theories and demonstrate their invalidity.

*A*

*Plaintiff's Argument That, If There Was Five Years Exposure in the Last Fifteen, None of It Was After December 1, 1961.*

Plaintiff was the carrier for defendant employer for 30 days before defendant Lund's employment with defendant employer terminated. Plaintiff asserts (and we concur) that it cannot be liable unless there was some harmful exposure during that 30 days. We might well agree that the December employment did not entail harmful exposure, but we must certainly contradict plaintiff's averment that the evidence less strongly supports a finding of harmful December exposure than it supports that finding with reference to any previous employment period after 1931. The strongest evidence of harmful exposure defendant Lund presented at the hearing had

relation only to his work in the carpenter shop at Keetley. During that employment, he was cleaning dried muck off tools with an emery wheel — an activity which created so much dust that a respirator was acknowledged to be necessary. Besides that, defendant Lund continued to be exposed to whatever general dust conditions prevailed in a mining community.

Before he moved to Keetley, defendant Lund's exposure was not direct and was aggravated, if at all, only when the wind off the mine dump caused general atmospheric pollution. We do not believe the O. D. Law contemplates that an employer should be responsible for disease processes attributable to the kind of exposure which all residents in an area where the soil has silica content must endure. This was the nature of defendant Lund's exposure until May 1, 1957 (see plaintiff's brief, page 3) when he was transferred to Keetley.

If there was any harmful exposure after defendant Lund came out of the mine in 1931, it was certainly the exposure entailed in the tool cleaning and associated activity at Keetley. The Commission specifically found the exposure in December to have been harmful (R. 86) and, if the record supports any Commission finding, it supports that one.

*B*

*Plaintiff's Argument That the Act Requires 30 Separate Days of Harmful Exposure in the Employment of an Employer Before That Employer Can Have Responsibility.*

Before undertaking to criticise this argument, we should make it clear that we deny that plaintiff could escape responsibility in this case even if it were conclusively demonstrated that plaintiff was not the compensation carrier "during a period of thirty days" when the applicant was harmfully exposed. An entire section of this brief will be devoted to this point. Nevertheless, we feel the position should be asserted that (even if the requirements of Section 35-2-14 had to be satisfied with reference to insurance carriers as well as employers) the exposure in the instant case, if it was harmful at all, was sufficient during December of 1961 so that plaintiff is responsible.

Section 35-2-14 initially provided that the only employer liable would be the one in whose employment the employee had last been harmfully exposed "during a period of *sixty* days or more." From a medical point of view, even a sixty-day continuous exposure would be a ridiculous basis on which to predicate responsibility for the disease. Our legislature (Section 35-2-13, U.C.A. 1953) clearly recognized, in conformity with accepted medical doctrine, that five years' exposure is the least which will produce the disease. The sixty (now thirty) day period of employment which imposes the compensation obligation on an employer was never intended as a standard of culpable exposure. The sixty-day period after which an employer would become responsible was provided for only one reason — so that an employer would have time to make an appropriate investigation to determine whether a new employee was free enough from lung dis-

ease so that he could safely be retained in employment. Otherwise, no employer could afford to employ a miner *until* it had been determined that the miner was not already silicotic. The sixty-day grace period made it possible for hard rock miners to avoid long hiatuses in their employment while employers made sure it was safe to employ them. It also gave employers a reasonable period after the effective date of the O. D. Law within which to "clean up" their mines.

If the reason for the "thirty day period" is understood, plaintiff's argument that the employee must show exposure on thirty separate days loses all its vitality. An employee need only show his last harmful exposure was *during* (not on each of) thirty days when he had the status of employee of the employer against whom he asserts his claim. In the instant case, plaintiff was the defendant employer's insurance carrier "during a period of thirty days" within which defendant was harmfully exposed after 1931.

## POINT II.

### THAT INSURANCE CARRIER IS LIABLE TO PAY BENEFITS FOR SILICOSIS WHICH WAS "ON THE RISK" AT THE TIME OF LAST EXPOSURE, AND THERE IS NO STATUTORY REQUIREMENT THAT THE LIABLE CARRIER HAVE BEEN "ON THE RISK" FOR THIRTY DAYS.

Plaintiff's final argument begins with the assumption that this court will hold that the exposure "during a thirty day period" (as required by Section 35-2-14 in

order to make the last employer liable) must be harmful exposure on each of 30 separate days. We will say no more about how ill-warranted that assumption is. The ingenious argument is that Section 35-2-14 limits responsibility not only to the last employer in whose employment the employee was last exposed during 30 days *but also* to the last insurance company who insured the liable employer during a 30-day period when the employee was exposed.

By urging such a construction of this section, which reads, in its entirety, as follows:

> "Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, provided that in the case of silicosis the only employer liable shall be the employer in whose employment the employee was last exposed to harmful quantities of silicon dioxide ($SiO_2$) dust during a period of thirty days or more after the effective date of this act."

Plaintiff asks this Court to engage in a monumental effort of judicial legislating. There is no word in the section which carries any remote suggestion that the legislature intended to change, for the purpose of compensation insurance, any basic concept of insurance law. If the section were to be amended by the insertion of the words plaintiff would have this Court read between the lines, it would be doubled in length.

The plaintiff's argument that Section 35-2-14 should be applied to determine which of successive carriers

should be responsible as if they were successive employers will not bear scrutiny. To apply the Section as the plaintiff suggests would lead to a ridiculous result in any number of entirely probable situations. Suppose, for instance, that an employer, then insured by a private carrier, employs a silicotic for the first time on November 15. He works underground in dusty environment for thirty consecutive days. On December 1, however, the employer's policy expires and he insures with the State Insurance Fund. The silicotic becomes disabled on December 16. Who, under the plaintiff's theory, must respond? Plaintiff apparently believes the employer should pay the benefits, even though the employer was always insured as the law requires and even if the employer were insolvent and unable to pay such benefits.

The plaintiff cites the Deza case (*Pacific Employers Ins. Co.* v. *Commission,* 108 Utah 123) as authority for the proposition we now criticize. We submit that the Deza case says plainly and without equivocation that the carrier who must respond (where there have been two or more carriers on the risk during the period of exposure) is the one who insures the employer "*on the date*" of last harmful exposure. On page 124, the Court makes this statement:

> "From the foregoing statement of facts, it is seen that the last exposure to silicon dióxide dust was June 7, 1943. The significant importance of this *date* will become apparent immediatly." (Our emphasis.)

Again, on page 128, the Court says this:

> "As has been pointed out, however, *June 7, 1943,*

> *was the date of the last exposure* of the applicant to harmful quantitis of silicon dioxide dust, and from that date until his employment ceased because of total disability on March 25, 1944, he continued in the employ of the Mines Company but in the capacity of a watchman above ground on the property of the Company. The insurance carrier at the time of *such last exposure* was the State Insurance Fund; *this is the date* which fixes the liability of the employer, and consequently also attaches the liability to the employer's insurance carrier *as of that date.*" (Our emphasis.)

What the Deza case really says is that the critical date (in determining which carrier should respond) is the date of last exposure and not the date of disability. The Court specifically found that Deza had *never* been harmfully exposed while Pacific Employers was on the risk. There was no discussion at all about the need for thirty days' exposure while a particular carrier is on the risk. The thirty-day criterion applies only to employers. It could not logically apply to both employers and carriers.

Respectfully submitted,

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